



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

17 April 1995

REPLY TO
ATTENTION OF:

CECW-OR
CECC-K

MEMORANDUM FOR DIVISION AND DISTRICT COMMANDERS

SUBJECT: Lessons Learned from *City National Bank of Miami v. U.S.*

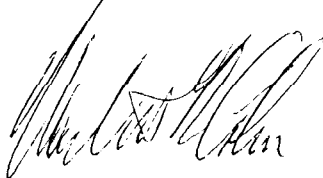
1. *City National Bank* is a rock mining takings case out of South Florida that the plaintiffs have argued is similar to *Florida Rock Industries, Inc. v. United States*. The principal distinction between the two cases is that Florida Rock filed suit against the Corps after having received a "substantive" denial of its application for a rock mining permit, while City National Bank filed suit after having received a "procedural" denial for failure to complete the preconditions necessary for a Corps final permit decision.

2. A substantive denial is based on the merits of the proposed project and is made by the District Engineer following the required public interest review and evaluation of the completed permit application. A substantive denial follows a Corps determination that the proposed discharges will not comply with the 404(b)(1) guidelines, and that they will be contrary to the public interest. To reach this stage of final decision-making, the applicant must have submitted a complete application; the application must have been processed pursuant to 33 CFR 325; and either a Section 401 water quality certification or a waiver must have been received from EPA or from the state, as well as a statement of Coastal Zone Management Act consistency, if required. A "procedural" denial, or denial without prejudice to resubmission of the application, is not considered a final agency action as that term is defined in the APA. It allows the applicant to "complete" its application or supplement it with the requisite certifications and approvals.

3. In *City National Bank*, the denial was without prejudice based upon the state denial of the required state Sec 401 water quality certification. It was intended to be a clear procedural denial. However, the denial letter sent to the applicant discussed substantive issues of concern with the proposed activities and noted that those activities, as proposed, would have difficulty in complying with the Sec 404 (b)(1) guidelines.

4. In response to *City National Bank's* takings claim in the Court of Federal Claims, the government moved to dismiss the case, arguing that it was not ripe for adjudication inasmuch as we had not taken any final agency action. However, the Court has looked behind the words "without prejudice" and concluded that the substantive discussion of the proposed activity in the "denial without prejudice" letter sent to the applicant indicates that the Corps would have denied the permit on the merits. Based on this belief, the Court has denied our motion for dismissal and the case is proceeding to trial on its merits.

5. LESSON: The simple lesson is that if the Corps intends to deny a permit without prejudice, the letter returning the application to the permittee *should not* discuss any substantive problems with the proposed activity. Indeed, a simple sentence or two returning the application and suspending any further processing until such time as the applicant receives the required authorization or certification (e.g. state water quality certification or waiver), and a statement that we have in no way made any *final* determinations concerning the merits of the application, should suffice. This should maximize our chances of successfully arguing the ripeness defense in similar situations in the future.



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